IN THE HIGH COURT OF GUJARAT AT AHMEDABAD

SPECIAL CIVIL APPLICATION No 10588 of 2002

For Approval and Signature:

HON'BLE MR.JUSTICE AKSHAY H.MEHTA

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1. Whether Reporters of Local Papers may be allowed to see the judgements? : NO

2. To be referred to the Reporter or not? : NO

3. Whether Their Lordships wish to see the fair copy of the judgement? : NO

4. Whether this case involves a substantial question of law as to the interpretation of the Constitution of India, 1950 of any Order made thereunder? : NO

5. Whether it is to be circulated to the concerned Magistrate/Magistrates,Judge/Judges,Tribunal/Tribunals? : NO

KALPATARU POWER TRANSMISSION LTD

Versus

BHARATBHAI KANTILAL KADIYA

Appearance:

1. Special Civil Application No. 10588 of 2002

MR DIPAK R DAVE for Petitioner No. 1

MR BP GUPTA for Respondent No. 1

MR KV GADHIA for Respondent No. 1

RULE UNSERVED for Respondent No. 2

CORAM : HON'BLE MR.JUSTICE AKSHAY H.MEHTA

Date of decision: 25/06/2004

ORAL JUDGEMENT

1. This petition is filed under Article 227 of the Constitution of India by the petitioner for challenging the award passed by the Labour Court in Reference (LCA) No. 1415 of 1998 dated 29th June, 2002. By the said award the petitioner has been directed to reinstate respondent no. 1 (hereinafter referred to as 'the workman') on his original post with continuity of service and to pay to him full back wages.

2. The facts, as they transpire from the record of the petition and in particular the judgment of the Labour Court in short are as under :-

2.1. According to the workman, he was working with the petitioner and respondent no. 2 for the last three years from the date of the termination of his service i.e. 1st October, 1997. It was his case that he worked as a daily wager and received Rs.65/- as wages and he also worked continuously for 240 days in each year. According to him his employer gave artificial breaks and made him sign blank forms so as to show that it was fresh appointment. According to him, the artificial breaks were being given with a view to avoid payment of dues legally admissible to him. It was his case that his service was terminated without any reason and before terminating the service requisite procedure was not followed nor any prior notice was given nor any pay in lieu of the notice was paid to him. He has, therefore, given notice to the employers to take him back in the service, but the said request was not accepted and hence he made complaint to the Conciliation Officer. Unfortunately, the conciliation proceedings failed and failure report came to be submitted. In view of the same, the Assistant Labour Commissioner, Ahmedabad by order dated 5th September, 1998 referred the dispute for adjudication to the Labour Court under section 10(1)(c) of the Industrial Disputes Act (hereinafter referred to as 'the Act'). The term of the reference was:

> "Whether Bharat Kantilal Kadiya (the respondent-workman) should be reinstated on his original post with full back wages ?"

It may be stated that the reference was filed against Narmada Labour Suppliers and Material Handling Contractor i.e. respondent no. 2 plus one. Needless to say that 'one' would mean M/s. Kalpataru Power Transmission Ltd. i.e. the petitioner.

2.2. The Labour Court served the workman with notice and pursuant to the same, he filed his statement of claim dated 10th December, 1998. In the said statement he had

averred that he was employed by petitioner for its own work and petitioner exercised effective control over respondent no. 2. He further averred that he worked for three years on a daily wage basis and received Rs.65/per day and he discharged his duties faithfully and sincerely. He contested that he had never committed any act of misconduct or any offence. According to him, he had worked for 240 days in a year; however, artificial breaks were being given by the petitioner with a view to avoid giving legal dues admissible to him. He further said that his service was illegally terminated without following the due procedure. He, therefore, prayed that the order of termination passed against him be declared as illegal. Further he be reinstated in service with all incidental benefits and be paid the back wages from the date of termination of his service till reinstatement.

2.3. The said claim was resisted by the petitioner by filing written statement at Exh. 15. According to it, the reference was illegal and not tenable at law. It has further contended that the averments made in the statement of claim with regard to petitioner having effective control on respondent no. 2 and that the workman was rendering service for the last three years on daily wage basis at the rate of Rs.65/- per day were not true. It also denied the averments of the workman that he had worked for 240 days in a year and that his employers and in particular respondent no. 2 gave him artificial breaks in service with a view to avoid the payment of legal dues admissible to him. It was also denied that his service was orally terminated with effect from 1st October, 1997. According to the petitioner, there was no relationship of employer and employee existing between the two. According to it, the workman was an employee of respondent no. 2, who was the contractor of the petitioner and petitioner was not at all concerned with the service conditions of the workman. It was, therefore, contended that the reference against the petitioner was not at all maintainable.

2.4. Respondent no. 2 also contested the claim by filing written statement at Exh. 13. Respondent no. 2 also denied all the averments that were made by the workman in the statement of claim. According to it, it was the workman who had voluntarily abandoned the service of respondent no. 2 since he had received better offer and he had actually joined that service. However, he was required to submit a certificate to his new employer which he had asked for from the petitioner. His request was not acceded to by the petitioner since the workman was not its employee. He insisted upon for having the

certificate from the petitioner. According to respondent no. 2, no reinstatement could be granted because it was the workman who had voluntarily and willingly left its employment and, therefore, there was no question of reinstating him on the said post. Both, the petitioner as well as respondent no. 2 prayed that the reference be dismissed.

3. At the trial, both the parties i.e. petitioner and respondent no. 2 on one side and the workman on the other, adduced evidence oral as well as documentary. The workman examined himself at Exh. 9. Petitioner examined one Bharatbhai Prahladbhai, whereas respondent no. 2 examined one Babubhai Shriram. Both the parties also placed reliance on the documentary evidence. Towards the end of the trial, petitioner as well as respondent no. 2 submitted joint written submissions wherein it was alleged that the workman had received another employment, but the present reference was filed only with a view to extract money from them.

3.1. At the end of the trial the Labour Court came to the conclusion that the workman was rendering direct work to the petitioner and that it was the petitioner, who was employer of the workman and the contract with respondent no. 2 was merely a camouflage. According to the Labour Court, since respondent no. 2 was not willing to reinstate the workman, the petitioner should reinstate him on his original post since in the opinion of the Labour Court the petitioner was the true and real employer. The Labour Court, therefore, passed the award allowing the reference and giving aforesaid directions. It is this award which is now under challenge.

4. Mr. D.R. Dave, learned advocate appearing for the petitioner has submitted that the judgment and award passed by the Labour Court are erroneous and against the material on record of the case. According to him, workman had no concern with the petitioner and the Labour Court had committed grave error in holding that the workman was the employee of the petitioner and not of respondent no. 2. It was further submitted that the direction issued to the petitioner to reinstate the workman on his original post was not only illegal but without any basis and beyond the scope of the reference made to it. He has further contended that if the workman intended to claim that he was employee of the principal employer i.e. the petitioner, the proper forum was the appropriate Government under the provisions of the Contract Labour (Regulation and Abolition) Act, 1970 for passing an order for abolition of contract labour.

However, according to him, the present proceedings were not the proper proceedings and the Labour Court has committed error in allowing the reference.

4.1. Mr. B.P. Gupta, learned advocate appearing for the respondent-workman has, however, supported the judgment and award made by the Labour Court. He has further submitted that looking to the circumstances on record, it was the petitioner who was the real employer of the workman and not respondent no. 2. He has lastly submitted that this petition has no merit and it is required to be dismissed.

4.2. Both the learned counsels have placed reliance on several decisions of the Apex Court as well as this Court.

5. Having carefully gone through the record of the petition and also the rival submissions made by the learned counsels for the parties, it appears that the workman was working with the petitioner and respondent no. 2. It is the say of the petitioner that the workman was employee of the respondent no. 2 contractor, however, fact remains that the workman was rendering service in the premises of the petitioner, which has been not only not disputed by the witnesses but it has been admitted by them that the workman was working in manufacturing the electric poles of the petitioner. These poles were required to be used in erecting tower. Further according to the workman, administrative offices of petitioner and respondent no. 2 were also situated in the same premises. In these circumstances and also coupled with the fact that the petitioner had failed to produce relevant record, it would appear that the workman in reality served the petitioner. In fact, on going through the record of the petition, it clearly appears that respondent no. 2 is nothing but part and parcel of the petitioner. It has got its own office in the same building. Even according to petitioner's witness whatever work that was rendered by the workman was as a part of the routine work of the petitioner. The Labour Court has taken into consideration all these facts and it has given direction that if respondent no. 2 refused to take the workman in service, it would be incumbent upon the petitioner to take him in service and give him his regular appointment.

5.1. Considering the record, it appears that the facts considered by the Labour Court and the conclusions based thereon cannot be any way termed as perverse or dehors the record. In fact the conclusions are proper and in

consonance with the evidence produced by the parties during the trial.

5.2. If that be so, can the Labour Court, if it comes to the conclusion that the termination was wrong, direct the petitioner to reinstate respondent workman in service? So far the termination of the service of the workman is concerned, the Labour Court has come to the conclusion that there was ample evidence to show that he had rendered service for two and half years and there was no evidence on record to show that he had not worked for 240 days in a year. In other words, according to the Labour Court, the workman had completed requisite service, namely 240 days in a year so as to require the employer to resort to provisions of section 25-F of the Act. That has not been done and obviously the order of termination of service was illegal. If this finding has been given, which is not only based on the reliable evidence on record, there is no reason for me to interfere with the same and reach to a different conclusion. In fact when the question based on facts is answered by the Labour Court in a particular way, this Court under Article 227 of the Constitution of India cannot interfere with the same, unless it is found to be perverse or dehors the record. When the Labour Court has held that the termination was illegal, I do not see any reason to interfere with the said finding and to upset the same.

6. The crucial question that is to be decided is whether the Labour Court was within its bounds to issue direction to the petitioner to reinstate the workman in its employment and grant him full back wages together with other incidental benefits. Mr. Deepak Dave, learned advocate for the petitioner has submitted that the finding given by the Labour Court is beyond the scope of reference made by the Assistant Labour Commissioner under section 10(1)(c) of the Act, in as much as the petitioner who had nothing to do with the workman has been directed to give employment to respondent no. 1 i.e. workman. In support of his contention, Mr. Dave has placed reliance on several decisions. The first decision is rendered by the Apex Court in the case of M/s. Firestone Tyre & Rubber Co. of India (P) Ltd. v/s. The workmen employed and represented by Firestone Tyre Employees Union reported in AIR 1981 S.C. at page 1626. In this decision the Industrial Tribunal was called upon to decide the question with regard to reinstatement of the concerned workmen of that case. The Tribunal while passing the order of reinstatement also held that the employer practiced discrimination and also

resorted to unfair labour practice. Such finding given by the Tribunal amounted to travelling beyond the scope of the reference.

6.1. The second decision that has been relied on by Mr. Dave is a decision of the Apex Court rendered in the case of Delhi Cloth & General Mills Co. Ltd. v/s. Their workmen reported in AIR 1970 S.C. at page 919. In that case, by the terms of reference, the Tribunal was called upon to adjudicate on the question of the fixation of gratuity alone; there was no reference made either expressly or by implication for fixation of the age of superannuation. The Tribunal, however, entered into the said question and gave its finding and decision on the aspect of fixation of the age of superannuation also. Ultimately when the matter came up before the Apex Court, objection was taken by the company i.e. the employer that by the express terms of the reference the Tribunal was only called upon to adjudicate the issue regarding fixation of gratuity and there was no reference either expressly or by implication with regard to fixation of age of superannuation. It was, therefore, contended that the Tribunal had travelled beyond the scope of the terms of the reference. This submission was accepted by the Apex Court and it was held that in absence of any terms of reference relating to fixation of the age of superannuation, the Tribunal was not competent to fix the age of superannuation.

6.2. The third decision relied on by Mr. Dave is rendered by the Apex Court in the case of Pottery Mazdoor Panchayat v/s. The Perfect Pottery Co. Ltd. reported in AIR 1979 S.C. p. 1356. It is also on the same line. In the said decision it has been held that the jurisdiction of the Industrial Tribunal in industrial dispute is limited to the points specifically referred for its adjudication and to matters incidental thereto and the Tribunal cannot go beyond the terms of reference.

6.3. There is no dispute with the proposition of law laid down by the aforesaid decisions of the Apex Court. From the above it can be seen that any forum under industrial law cannot travel beyond the terms of reference made to it and it has to adjudicate upon and give its decision on the disputes referred to it and to the incidental matters. It cannot travel beyond its scope. However, considering the facts of the present case, it cannot be said that the Labour Court had travelled beyond its scope. Copy of the reference is produced on record of the case. The Assistant Labour Commissioner, Ahmedabad Division has referred the

industrial dispute for adjudication to Court No. 2 at Ahmedabad upon failure of the conciliation proceedings, which were initiated in view of the complaint made by the workman. The demand was made by the workman that he be reinstated in service by the petitioner as well as respondent no. 2. The reference which has been made is also against two, namely respondent no. 2 plus one i.e. the petitioner. It states that whether Bharat Kantilal Kadiya is required to be reinstated on his original post with full back wages. In light of the said reference, when the workman was called upon to file its statement of claim, he has prayed that it be declared that the decision of the first party relieving him was illegal. He has further prayed that the first party be directed to reinstate him on his original post and they be directed to pay to him all the incidental benefits as well as arrears of wages. It may be noted here that in the reference proceedings first party comprises (1) Narmada Labour Suppliers i.e. respondent no. 2 and (2) M/s. Kalpataru Power Transmission Ltd. i.e. the petitioner and second party is Bharat Kantilal Kadiya i.e. the workman.

6.4. In light of this factual position, it can hardly be said that the Labour Court had travelled beyond the scope of terms of reference when it directed the petitioner to reinstate the workman on his original post. This very dispute has been referred to the Labour Court by the Assistant Labour Commissioner while exercising power u/S. 10(1)(c) of the Act and the Labour Court has been called upon to adjudicate upon this dispute and give its decision. While doing so, incidentally it has also explored the factual situation whether the principal employer, namely the petitioner is the real employer of the workman. It has found from the circumstances on record that the workman was actually rendering service to the petitioner and not to the intervening agency, namely the contractor. It has also taken into consideration certain other aspects to which I will shortly revert to. Suffice it to say that when this finding is given and based on such finding if the ultimate direction against the petitioner is given by the Labour Court, it can never be said that the Labour Court had travelled beyond the scope of the terms of the reference. Thus, on the facts of this case the decisions cited by Mr. Dave will not apply.

7. The second submission of Mr. Dave to the effect that if the workman wanted to challenge contract labour, he should have approached proper authority/forum, namely the State Government for abolition of the contract labour

in this unit of the petitioner. This submission cannot be accepted simply because the nature of the dispute that has been raised by the workman is not at all challenged in the employment of contract labour in this unit of the petitioner on the ground that the work is of perennial nature and it requires continuous engagement of labour, etc. His case is that the nature of work with which he was required to do was directly relating to the work of the principal employer i.e. the petitioner and the intervening agency/contractor hardly came into the picture. He has, therefore, prayed that the petitioner be directed to reinstate him in service. Such dispute amounted to industrial dispute which could be adequately adjudicated upon by the machinery created under the Act and Labour Court would be the proper forum for the same. There was nothing wrong when the reference was made to the Labour Court in connection with the dispute that was raised by the workman and the Labour Court ultimately gave its decision in favour of the workman.

8. So far Mr. Gupta is concerned, he has submitted that considering the factors on record relating to the service that is rendered by the workman to the petitioner, it is very clear that he was under the direct control and supervision of the principal employer i.e. petitioner and not respondent no. 2. In his submission, if that be so, he would be the employee of the principal employer and not of that of the contractor. In support of said contention he has placed reliance on the decisions of the Apex Court and of this Court. The first decision is rendered by the Apex Court in the case of Bharat Heavy Electricals Ltd. v/s. State of U.P. reported in (2003) 6 S.C.C. p. 528. In that case the Apex Court was required to examine the question regarding employer and employee relationship and it has specified certain factors which will enable the Court to find out whether the principal employer was the real employer of the concerned workman. Before I discuss said decision of the Apex Court in detail, it would be worthwhile to set-out the circumstances which have prompted the Labour Court to come to the conclusion that the workman was an employee of the petitioner. So far the evidence on record is concerned, it appears from it that (i) respondent no. 2 was working as contractor with the petitioner, (ii) that offices of the petitioner and respondent no. 2 have been situated in the same premises, (iii) the workman was working in the premises of the petitioner, (iv) he was engaged in the work of manufacturing electric poles and also in erecting the transmission towers of the petitioner and (v) he was working in the premises of the petitioner from 8.00 a.m.

to 4.30 p.m. Apart from the aforesaid factors, from the record of the case there are some indications which were taken into consideration to presume that the petitioner and respondent no. 2, though on paper were two separate independent entities, in fact they were one and the same and they are : (i) a common advocate appeared before the Labour Court for petitioner and respondent no. 2, (ii) the documentary evidence adduced on behalf of the petitioner and respondent no. 2 was produced by a common list at Exh. 16 and (iii) a common written submissions were tendered at the end of the trial by the learned advocate for them.

8.1. The factors regarding working of the respondent/workman have been duly considered by the Labour Court. It has found that the workman had rendered continuous service of 240 days in each year. It has also found that the workman has worked for two and half years with petitioner and respondent no. 2. Further it has found that the contention of the petitioner that workman was not its employee, was not true. The workman was working in the premises/compound of the petitioner and whatever work he had rendered was in relation to towers erected by petitioner. Thus, the Labour Court has come to the conclusion that even if respondent no. 2 declined to accept the workman in service, it was incumbent upon the petitioner to re-employ him or reinstate him. Reverting back to the aforesaid decision of the Apex Court in Bharat Heavy Electricals Ltd. (supra), it would be necessary to note that in the said case the workmen were working as gardeners and they were engaged through contractor to sweep, clean, maintain and look after the lawns and parks inside factory premises and campus of the residential colony of the appellant - company. The question that arose before it was whether the said persons, namely the gardeners were the employees of the appellant i.e. the principal employer. While deciding the said case the Apex Court has observed that for the purpose of determining the true relationship, it would be necessary to lift the veil and find out the correct position. The Apex Court has laid down a proposition of law that where a workman-labour is engaged to produce goods or services and the goods or services are business of another, the other is the employer. The Apex Court also laid down that the factors like the work rendered by the concerned workmen, the maintenance of supervision by the principal employer on such work, the control exercise by the principal employer would also be relevant factors to come to the conclusion that it was the principal employer who was the real employer of the concerned workmen. To the facts of the present case which have

been stated above, these factors can very well be applied and that would leave no manner of doubt that the workman actually rendered service to the petitioner and also that the petitioner and the respondent-contractor though on paper were separate entities, were one and the same.

8.2. The second decision relied on by Mr. Gupta is rendered by the Division Bench of this Court in the case of Steel Authority of India Ltd. v/s. Gujarat Mazdoor Panchayat reported in 2004 (1) G.L.R. p.729. In the said decision the Division Bench of this Court has discussed the scope of petition under Articles 226 and 227 of the Constitution of India, while deciding the award delivered by the forum under the Act. It has held that :

> "Under Art. 226 of the Constitution, High Court will not interfere with weighing of evidence led before the Tribunal as if the High Court were sitting in appeal. A finding of fact cannot also be challenged on the ground that relevant materials and evidence adduced before the Tribunal was insufficient or inadequate to sustain the findings recorded by the Tribunal. The adequacy or sufficiency of evidence and the inferences to be drawn from the evidence are the exclusive domain of the Tribunal and the same cannot be agitated before the writ Court. This is so, because the Tribunal is constituted under Special Legislation to resolve the dispute of a kind qualitatively different from ordinary civil disputes. This is also so because the Tribunals are not bound by the strict Rules of evidence. Merely because more than one view is possible on the evidence led before the Tribunal, the writ Court would not be justified to interfere with the findings recorded by the Tribunal. Of course, if the findings recorded by the Tribunal are perverse or irrational or arrived at by ignoring materials on record or arbitrary or contrary to the principles of natural justice, the same can be interfered with by the High Court in a petition under Art. 226 of the Constitution wherein certiorari is claimed."

Thus, when the Labour Court has come to the conclusions which are purely based on facts, this Court, when called upon to issue a writ of certiorari, cannot reappreciate these facts and come to a different conclusion. The Division Bench has also gone to the extent of saying that

even the adequacy of the material on record is not to be examined by the High Court as it is not sitting in appeal over the judgment of the Tribunal or the Labour Court. In this decision it has also been laid down that when the Industrial Tribunal or the Labour Court is not made a party to the petition, it is a petition under Article 227 of the Constitution of India. Thus, in the present petition no such respondent is there. It is, therefore, under Article 227 of the Constitution of India and the restrictions imposed by the Division Bench of this Court will certainly come in my way to reach to a different conclusion.

9. Lastly it was submitted by Mr. Dave that the workman on his own left the job as he wanted to join somewhere else. To support this submission, he has also drawn my attention to certain letters which were written by the workman to the petitioner as well as respondent no. 2 requesting the petitioner to issue in his favour the experience certificate. In the said letters request was made that it should be furnished to the workman as he required it for the new job. It is also sought to be suggested before the Labour Court that the workman had actually joined the firm of Anandji Kalyanji. However, no such definite evidence was brought on record as found by the Labour Court. Whether the request for issuing experience certificate would conclusively show that the workman was gainfully employed somewhere else; I have my own doubts. On the contrary, it is sought to be canvassed by the workman that only because of the adamant attitude of the petitioner in not issuing the certificate, he could not get the job elsewhere. Thus, this factor indirectly helps the workman. However, all these are questions of facts and I am not inclined to render any opinion regarding the correctness of the same. When these factors have been adequately taken into consideration by the Labour Court, it is not for me to draw my conclusions on the same. This submission of Mr. Dave, therefore, cannot be accepted.

10. In the result, this petition has no merit and it deserves to be dismissed and it is hereby ordered to be dismissed. Rule discharged with no order as to costs.

11. At this stage Mr. Deepak Dave, learned advocate for the petitioner requests the Court to extend the interim relief granted by this Court earlier, for a further period of eight weeks from today, since he intends to challenge this judgment before the appropriate forum. Mr. Gupta , learned advocate for the respondent workman objects to it. However, considering the facts

and circumstances of the case, it is extended for a period of eight weeks from today.

[AKSHAY H. MEHTA, J.]

* Pansala.